



U.S. Department of Justice

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Southern District of New York*

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January 13, 2015

BY E-FILEING AND HAND DELIVERY

The Honorable Shlomo S. Hagler
60 Centre Street, Room 631
Supreme Court of the State of New York
County of New York
New York, NY 10007

Re: *All Craft Fabricators, Inc. v. ATC Associates Inc.*,
156899/2013

Dear Justice Hagler:

The United States of America, by and through its attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, concerning the inviolability and immunity of property, assets, and documents of the United Nations (the "UN") from legal process.¹

As detailed below, all property, assets, and documents of the UN, wherever located and by whomsoever held, are inviolable and are immune from legal process and suit absent an express waiver, pursuant to Article II, Sections 2, 3, and 4 of the Convention on the Privileges and Immunities of the United Nations ("General Convention"), adopted Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16. (The General Convention is attached hereto as Exhibit 1, and also available at <http://www.un.org/en/ethics/pdf/convention.pdf>.) The UN has stated that by contract, certain documents in the possession of the defendants, each of whom is a direct

¹ 28 U.S.C. § 517 provides that "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." The submission of a Statement of Interest does not constitute intervention by the United States in these proceedings. This letter is provided by the U.S. Attorney's Office, Civil Division, at the request of the Department of State in order to set forth the interests of the United States as they relate to the immunity of the UN.

contractor of the UN or a sub-contractor of a direct contractor of the UN, constitute property, assets, and/or documents of the UN, with respect to which the UN has not waived its immunity. In light of the UN's immunities under the General Convention, the property of the UN (including its proprietary documents) that is in the possession of the defendants is not subject to any legal process. A judicial order compelling the production of such property would thus violate the United States' treaty obligations under the General Convention.

Furthermore, the UN has explained that the documents at issue include sensitive information about non-public spaces within the UN complex that would cause security issues if disclosed. As discussed herein, however, the UN has represented that it will cooperate with the parties in order to determine whether, within the framework of its status and privileges and immunities, the UN is in a position to authorize the release of documents for the purposes of this case, in addition to documents the UN has, in fact, already voluntarily authorized for release.

BACKGROUND

In the above-referenced matter (hereinafter, the "All Craft Suit"), plaintiffs allege that the defendants, who are all direct contractors of the UN or sub-contractors of direct contractors of the UN, are responsible for an asbestos contamination at plaintiffs' facilities and offices. *See* Complaint, dated July 29, 2013, ¶¶ 105-114. Specifically, plaintiffs contend that in connection with a major renovation project at the UN, the defendants transferred wood panels and doors from the UN to plaintiffs' facilities and offices so that plaintiff All Craft Fabricators could perform millwork on the salvaged materials, allegedly resulting in the purported contamination. *See id.* ¶¶ 85-114. Plaintiffs assert claims of negligence, trespass, and private nuisance. *See id.* ¶¶ 118-144.

In connection with the All Craft Suit, plaintiffs propounded numerous discovery demands to the defendants seeking the disclosure of materials relating to the refurbishment project at the UN, including, for example, correspondence, plans, surveys, photographs, blueprints, schematics, and diagrams. *See* Dkt. No. 33 (plaintiffs' combined discovery demands). When plaintiffs sought to compel the production of these documents, the defendants explained in submissions to this Court that, among other things, the documents are the property of the UN and are required, by contract, to be kept confidential. *See* Dkt. Nos. 45, 46, 49, 50. After a number of hearing dates, this Court indicated on December 8, 2014, that it would grant the relief requested by plaintiffs and directed the parties to settle an order reflecting that relief, for the Court's signature. *See* Dkt. No. 64.

In a Note Verbale dated December 5, 2014, and addressed to the United States Mission to the UN, the UN requested that the United States Government "take appropriate steps to ensure that the privileges and immunities of the United Nations are respected in this matter." *See* Exhibit 2 at 2. As host nation to the UN and as a party to

treaties (including the General Convention) governing the privileges and immunities of the UN, this submission by the United States sets forth the immunity of the UN in this matter.

The Note Verbale explains that “[e]ach of the defendants in this matter is either a direct contractor of the United Nations or a sub-contractor of a direct contractor.” Ex. 2 at 1. The UN has provided the relevant excerpts of its agreements with its direct contractors, as follows:

- UN Contract No. PD/C0026/10 between the UN and defendant Skanska USA Building Inc. (“Skanska”), the UN’s construction manager for the UN renovation project (Exhibit 3);
- UN Contract No. PD/C0246/03 between the UN and defendant HLW International LLP (“HLW”), the UN’s architect for the renovation project (Exhibit 4) (and the Consultant Agreement between HLW and its sub-contractor, defendant ATC Associates (“ATC”) (Exhibit 5));
- UN Contract No. PD/C0051/09 between the UN and Certified Moving & Storage Co., LLC (“Certified Moving”), the UN’s mover for the renovation project (Exhibit 6).

As the UN explains, the documents sought by the plaintiffs in discovery include “highly detailed architectural and construction drawings and plans of non-public spaces within the United Nations complex,” disclosure of which “would present a security risk for the [UN].” Ex. 2 at 2. Moreover, the relevant contracts “provide that all documents and all other data compiled by or received by such contractor or sub-contractor pursuant to its contract or sub-contract” relating to the UN renovation project “are the ‘property of the UN’ and require corresponding provisions to be included in all subcontracts.” Ex. 2 at 1-2. *See also, e.g.*, Ex. 3 (Skanska contract) ¶¶ 21.5, 21.23.4; Ex. 4 (HLW contract), art. 13, Annex A ¶¶ 5.0, 13.1; Ex. 5 (ATC subcontract) ¶ 5.1 (incorporating provisions of HLW contract); Ex. 6 (Certified Moving contract) ¶ 1.1(b) (incorporating General Conditions of Contract), Annex A ¶ 11.4.

The Note Verbale also conveys the UN’s willingness to “cooperat[e], within the framework of its status and privileges and immunities, to determine whether the Organization is in a position to authorize the release of its documents for the purposes of this case.” Ex. 2 at 2. To this end, the UN reportedly is engaging in discussions with the defendants as to the possibility that the UN may voluntarily authorize the disclosure of some of the requested documents. *Id.* Indeed, the UN states that it “has already authorized the disclosure of the entire proposed production of documents by one of the defendants.” *Id.* *See also* Ex. 7 (UN letter dated October 21, 2014, voluntarily authorizing production of documents owned by the UN pursuant to its contract with defendant Certified Moving).

DISCUSSION

The Property of the UN (Including Its Proprietary Documents), Wherever Located and by Whomsoever Held, Is Immune from Legal Process

The UN Charter provides that the UN “shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment [sic] of its purposes.” UN Charter, art. 105, § 1. The UN’s General Convention, which the UN adopted shortly after the UN Charter, defines the UN’s privileges and immunities, and specifically provides that “[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity.”² General Convention, art. II, § 2; *see* Ex. 1. Moreover, “[t]he property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.” General Convention, art. II, § 3. Finally, “[t]he archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located.” General Convention, art. II, § 4.

As courts have long recognized, the United States is a party to the General Convention. *See, e.g., Brzak v. United Nations*, 597 F.3d 107, 111 (2d Cir. 2010); *Sadikoglu v. United Nations Development Programme*, No. 11 Civ. 0294(PKC), 2011 WL 4953994, at *3 (S.D.N.Y. Oct. 14, 2011); *Askir v. Boutros-Ghali*, 933 F. Supp. 368, 371 (S.D.N.Y. 1996); *Shamsee v. Shamsee*, 74 A.D.2d 357, 361 (N.Y. App. Div. 1980); *Hunter v. United Nations*, 800 N.Y.S.2d 347, 2004 WL 3104829, at*2-3 (N.Y. Sup. Ct. Nov. 15, 2004). Moreover, numerous New York courts have acknowledged the need to respect and enforce the UN treaty obligations of the United States. *See, e.g., Corcoran v.*

² There has been no express waiver of immunity in this case. As established by the General Convention, any waiver of the UN’s absolute immunity from suit or legal process must be “express[.]” General Convention, art. II, § 2; *see also, e.g., United States v. Chalmers*, No. S5 05 CR 59(DC), 2007 WL 624063, at *2 (S.D.N.Y. Feb. 26, 2007) (finding that the UN had not waived its immunity as to its own documents, even where it had agreed voluntarily to produce some of them, because “[e]xpress waiver requires a clear and unambiguous manifestation of the intent to waive”); *Hunter v. United Nations*, 800 N.Y.S.2d 347, 2004 WL 3104829, at*3-5 (N.Y. Sup. Ct. Nov. 15, 2004) (finding no express waiver of the UN’s immunities and opining that the “policy underlying the immunity of an international organization . . . suggests that the Court should be slow to find an ‘express’ waiver”). In this matter, the UN has expressly asserted its immunity, citing Article II of the General Convention and averring that “all documents and all other data compiled by or received by” each contractor or sub-contractor defendant “are the ‘property of the United Nations.’” Exhibit 2 at 1-2; *see also id.* at 2 (requesting “that the United States Government take appropriate steps to ensure that the privileges and immunities of the United Nations are respected in this matter”).

Ardra Ins. Co., 77 N.Y.2d 225, 230 (N.Y. 1990) (noting that “[t]he Supremacy Clause provides that ‘all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land’” and analyzing the applicability of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards); *Cooper v. Ateliers de la Motobecane*, 57 N.Y. 2d 408, 410-15 (N.Y. 1982) (enforcing the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards); *Hunter*, 2004 WL 3104829, at *2-6 (because of the immunities conferred by the UN Charter and General Convention, dismissing claims against the UN, a UN agency, and UN officials); *Curran v. City of New York*, 77 N.Y.S.2d 206, 211-12 (N.Y. Sup. Ct. 1947) (analyzing plaintiff’s allegations in light of the provisions of and immunity conferred by the UN Charter).

The United States understands the General Convention, Article II sections 2, 3, and 4, to mean what they unambiguously say: all property of the UN, *wherever located and by whomsoever held*, enjoys absolute immunity from legal process except where expressly waived. To the extent there could be any alternative reading of the General Convention’s text, the Court should defer to the Executive Branch’s reasonable interpretation. *See Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (“It is well settled that the Executive Branch’s interpretation of a treaty is entitled to great weight.”) (internal citation and quotation marks omitted); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (“While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.”); *Tachiona v. United States*, 386 F.3d 205, 216 (2d Cir. 2004) (interpreting the General Convention and noting, “in construing treaty language, ‘[r]espect is ordinarily due the reasonable views of the Executive Branch’”) (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999)); *Keesler v. Fuji Heavy Indus., Ltd.*, 862 N.Y.S.2d 815, 2008 WL 860116, at *2 (N.Y. Sup. Ct. Mar. 28, 2008) (Courts are required to ‘give great weight to treaty interpretations made by the Executive Branch’”) (quoting Restatement (Third) of Foreign Relations Law of the United States § 326(2) (1986)); *Curran*, 77 N.Y.S. 2d at 208-09 (deferring to the executive branch’s determination regarding the immunity of the UN and the UN Secretary-General). Here, the Executive Branch, and specifically the Department of State, is charged with maintaining relations with the United Nations, and so its views are entitled to deference.

Consistent with the applicable treaty language and the Executive Branch’s and the UN’s views, federal and state courts have repeatedly declined to subject the property, assets, or documents of the UN, wherever located or by whomsoever held, to legal process or other judicial orders. *See, e.g., United States v. Chalmers*, No. S5 05 CR 59(DC), 2007 WL 624063, at *1-3 (S.D.N.Y. Feb. 26, 2007) (in a case involving a subpoena *duces tecum* to the UN, denying a motion to compel the production of documents from the UN, citing the UN’s immunity under, *inter alia*, the General Convention, and observing that the UN had voluntarily agreed to produce some documents); *Paris v. Dep’t of Nat’l Store Branch 1 (Vietnam)*, No. 99 Civ. 8607 (NRB),

2000 WL 777904, at *1-5 (S.D.N.Y. June 15, 2000) (citing the UN Charter and the General Convention in vacating a restraining notice on funds held in an account at Banque National de Paris, where the account was governed by an agreement between the bank and the UN providing that the funds are “specifically-identified assets held by the United Nations”); *Shamsee*, 74 A.D.2d at 361-62 (holding that moneys held in a UN pension fund are immune from process pursuant to, *inter alia*, the General Convention).

Therefore, the property of the UN (including its documents), wherever located and by whomsoever held, is immune from legal process absent an express waiver. Accordingly, an order requiring the production of any UN proprietary documents would be contrary to the UN’s rights, and the obligations of the United States, under the General Convention. As described herein, however, the UN has expressed its willingness to assess, within the framework of its privileges and immunities, whether it is in a position voluntarily to authorize the release of documents at issue in this matter, and continues to engage in discussions with the defendants on this issue.

Thank you for your consideration of this matter.

Respectfully,
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